

The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative

I. INTRODUCTION

Generally, “spoliation of evidence” involves the tampering with, interference with, loss of, or destruction of evidence or potential evidence that is to be used in an already pending or contemplated litigation.

There are two situations in which the issue of spoliation of evidence may arise. First, when one of the parties to a pending or potential suit interferes with the evidence. Second, when an independent, disinterested third party interferes with the evidence. As will be discussed in this Note, it is the latter of the two that poses the most difficult remedial problems.

The causes of action for spoliation of evidence also differ depending on whether the destruction of the evidence was intentional or negligent. For example, many remedial devices exist that serve to deter intentional spoliation of evidence.¹ However, few, if any, exist in the case of negligent spoliation of evidence. As a result, in cases of negligent spoliation of evidence, an independent tort action may be the aggrieved party’s only remedial alternative.

This Note will examine the emerging tort action of negligent spoliation of evidence.² Included is an introduction to the similar tort of intentional spoliation of evidence and the current remedies and deterrents that exist to deal with those situations. As will be discussed, the remedies available to a victim of negligent spoliation are not necessarily the same as those available to the victim of intentional spoliation. In addition, this Note will focus on whether courts confronting the issue for the first time should adopt the new tort action.

II. INTENTIONAL SPOLIATION OF EVIDENCE

A. Situations in Which the Intentional Spoliation of Evidence Has Arisen

Possibly the best example of one party intentionally destroying evidence is the California case of *Smith v. Superior Court for County of Los Angeles*.³ In

¹ 29 AM. JUR. 2D *Evidence* § 177 (1967); *see also* *Equitable Trust Co. v. Gallagher*, 77 A.2d 548 (Del. 1950); *Trupiano v. Cully*, 84 N.W.2d 747 (Mich. 1957); *McHugh v. McHugh*, 40 A. 410 (Pa. 1898).

² This is distinct from the intentional spoliation of evidence. However, the tort of intentional spoliation of evidence must be examined to fully comprehend the related negligence tort.

³ 151 Cal. App. 3d 491 (1984).

Smith, the plaintiff was permanently blinded when a tire flew off of the van in front of her and smashed into her windshield, causing pieces of glass to strike her in the face.⁴ Immediately after the accident, the van was towed to Abbott Ford for repairs. The wheels had been previously installed on the van by Abbott prior to the accident.⁵ While the van was there, Abbott Ford either destroyed or lost the relevant parts of the van and van wheels, rendering any inspection of the parts for design or production defects impossible.⁶

Mrs. Smith brought an action against Abbott for intentional spoliation of evidence, claiming that she was damaged by Abbott's actions, which had resulted in seriously diminishing the chances of receiving any compensation for her injuries.⁷ The trial court, however, refused to recognize this new tort, and granted Abbott's demurrer.⁸ The plaintiff filed a petition for writ of mandate to force the trial court to allow the spoliation cause of action.⁹ The California Court of Appeals held that the plaintiff could proceed with her cause of action for interference with her civil litigation by Abbott's alleged intentional spoliation of evidence, even though she could not plead her damages with certainty.¹⁰ Ironically, after the California Supreme Court denied Abbott's request for rehearing, Abbott Ford found the relevant missing parts, and within a few weeks the case was settled out of court.¹¹

B. Remedies

Although in *Smith*, the court eventually recognized the tort of intentional spoliation of evidence, this is not the only protection the law provides to aggrieved parties. Other remedies and safeguards also exist to protect evidence from being intentionally tampered with or destroyed.

1. Presumption

The oldest and most common method of dealing with the situation in which one party to the litigation destroys or fails to produce relevant evidence goes

⁴ *Id.* at 494.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 495.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 503.

¹¹ Pati Jo Pofahl, Comment, *Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 961 n.4 (1985).

back to seventeenth century England,¹² and is commonly referred to as the doctrine of *omnia praesumuntur contra spoliatores*.¹³ This is the use of a "presumption" against the destroying party. "[I]ntentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have been unfavorable to the cause of the spoliator."¹⁴

However, such a presumption or inference arises only when the spoliation or destruction was intentional and indicates fraud. It does not arise if the destruction was routine or with no fraudulent intent.¹⁵ For example, documents destroyed under a generally accepted document destruction policy of a corporation *with no intent to fraudulently destroy evidence* would not entitle a party to invoke the inference against the destroyer.¹⁶

The other qualification of the doctrine is that the presumption is not conclusive, but rebuttable.¹⁷ "[T]he inference may be overcome by evidence in the record giving a satisfactory explanation, even when there is actual tampering,"¹⁸ and "the opponent may always introduce such facts as serve to explain away, on some other hypothesis, the apparent significance of the fraudulent conduct."¹⁹ Thus, the "presumption" remedy may be inadequate because it does not provide a definite, certain penalty for the spoliation of the evidence.

¹² *R. v. Arundel*, Hob. 109 (1617) (dealing with non-production of title deeds which the court assumed were intentionally suppressed); see also Comment, *Omnia Praesumuntur Contra Spoliatores*, 1 ADEL. L. REV. 344, 344 (1962).

¹³ *Berthold-Jennings Lumber Co. v. St. Louis, I.M. & S. Ry. Co.*, 80 F.2d 32, 41-42 (8th Cir. 1935), cert. denied, 297 U.S. 715 (1936); see BLACK'S LAW DICTIONARY 980 (5th ed. 1979).

¹⁴ 29 AM. JUR. 2D *Evidence* § 177 (1967); see also WIGMORE ON EVIDENCE § 278 (Chadbourn rev. ed. 1979) ("It has always been understood . . . that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation . . . is receivable against him as an indication of his consciousness that his case is a weak or unfounded one."); *Gumbs v. International Harvester Inc.*, 718 F.2d 88, 96 (3d Cir. 1983); *Felice v. Long Island R.R.*, 426 F.2d 192, 194-95 (2d Cir. 1970), cert. denied, 400 U.S. 820 (1970); *United States v. Remington*, 191 F.2d 246, 251 (2d Cir. 1951); *United States v. Freundlich*, 95 F.2d 376, 378-79 (2d Cir. 1938).

¹⁵ 29 AM. JUR. 2D *Evidence* § 177 (1967).

¹⁶ See *Berthold-Jennings Lumber*, 80 F.2d at 42.

¹⁷ 29 AM. JUR. 2D *Evidence* § 177 (1967).

¹⁸ *Wong v. Swier*, 267 F.2d 749, 759 (9th Cir. 1959); see also *Tilton v. Iowa Oil Co.*, 33 P.2d 446, 448 (1934) ("Nevertheless we know of no authority which declares that the presumption is conclusive.").

¹⁹ WIGMORE ON EVIDENCE § 281 (Chadbourn rev. ed. 1979).

2. Criminal Statutes

Besides the use of the presumption against the interfering party, many jurisdictions have also attempted to deal with issues of intentional spoliation of evidence through the imposition of criminal obstruction of justice laws as opposed to recognizing a new tort.²⁰ These states are split between whether intentional spoliation of evidence constitutes a felony or merely a misdemeanor.²¹ Generally, criminal statutes do not preclude civil liability for the same criminal conduct. However, a number of courts have relied on the existence of these criminal penalties in refusing to recognize tort actions for the intentional spoliation of evidence.²²

Although a criminal statute may help deter parties from intentionally destroying or suppressing evidence, it gives little or no remedy to the party that is injured by the spoliator's action.²³ For example, what compensation would the plaintiff in the *Smith* case receive after realizing that her cause of action was virtually nonexistent solely because the defendant had lost the necessary parts of the van that she required to prove her case? Theoretically, her only remedial measure would have been to possibly request the prosecuting attorney for that jurisdiction to charge Abbott Ford with the obstruction of justice. This, however, obviously fails to provide an adequate remedy for parties who have lost a cause of action because of the spoliation of evidence.

3. Sanctions

The other remedy that exists for intentional spoliation of evidence is the imposition of sanctions under the applicable state or federal rules of civil procedure. Under Rule 37 of the Federal Rules of Civil Procedure, the court may impose sanctions upon a party for failing to comply with discovery requests.²⁴ In addition, Rule 37 also permits the entry of a default judgment on

²⁰ Pofahl, *supra* note 11, at 965-66; *see also* Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1087 (1987).

²¹ *See generally* ALASKA STAT. § 11.56.610 (1989); ARIZ. REV. STAT. ANN. § 13-2809 (1989); ARK. CODE ANN. § 5-53-111 (Michie 1987); CAL. PENAL CODE § 135 (West 1988); COLO. REV. STAT. § 18-8-610 (1986); CONN. GEN. STAT. ANN. § 53A-155 (West 1985); FLA. STAT. ANN. § 918.13 (West 1985); ILL. REV. STAT. ch. 38, para. 31-4 (1977); N.Y. PENAL LAW § 215.40 (McKinney 1988); OHIO REV. CODE ANN. § 2921.32 (Anderson 1987); OR. REV. STAT. § 162.295 (1990); 18 PA. CONS. STAT. § 4910 (1983); TEX. PENAL CODE ANN. § 37.10 (West 1989); UTAH CODE ANN. § 76-8-306 (1990).

²² Pofahl, *supra* note 11, at 966.

²³ Philip A. Lionberger, *Interference With Prospective Civil Litigation By Spoliation of Evidence: Should Texas Adopt a New Tort?*, 21 ST. MARY'S L.J. 209, 226 (1989).

²⁴ FED. R. CIV. P. 37(b)(2); *see also* TEX. R. CIV. P. 215(2)(b).

a party who does not comply with a court order mandating discovery.²⁵ However, as with criminal statutes, this does little to compensate the aggrieved party. Mere sanctions are not enough in comparison to the potential loss of an entire cause of action. Further, although a default judgment compensates the injured party because she wins the underlying action, the default judgment can only be imposed after the party fails to comply with both a discovery request and a court order compelling discovery.²⁶ Thus, a party "who destroys evidence prior to a discovery request is *unable* to comply with any subsequent request and therefore could not be punished for failing to comply."²⁷

4. Independent Tort Action

Despite the existence of the previously mentioned safeguards, courts in such states as California²⁸ and Alaska²⁹ have recently recognized the tort of intentional spoliation of evidence, presumably because of the inadequacy of the existing remedies for both compensating the aggrieved party and deterring the spoliator.

The Supreme Court of Alaska recently faced the issue of intentional spoliation of evidence in *Hazen v. Municipality of Anchorage*.³⁰ In *Hazen*, as a result of an undercover police sting operation, plaintiff was arrested and charged with assignation for prostitution.³¹ After the dismissal of the criminal charges, the attorneys for the plaintiff instructed the arresting officers that a tape recording made by them as part of the undercover operation would be required as evidence in a civil suit that was to be filed against the officers for false arrest, malicious prosecution, and defamation.³² When the tape was turned over to the plaintiff, it was no longer audible and was allegedly "taped over" by the defendants. Immediately, plaintiff amended her complaint to add a cause of action for intentional spoliation of evidence, alleging that the tape was tampered with by the defendants because it explicitly proved that she was wrongly arrested for prostitution.³³ The court, relying on *Smith v. Superior*

²⁵ FED. R. CIV. P. 37(b)(2)(C).

²⁶ See *Dorey v. Dorey*, 609 F.2d 1128, 1135 (5th Cir. 1980), *reh'g denied*, 613 F.2d 314 (5th Cir. 1980); Lionberger, *supra* note 23, at 227-28; Comment, *Spoliation: Civil Liability For Destruction Of Evidence*, 20 U. RICH. L. REV. 191, 207 (1985).

²⁷ Pofahl, *supra* note 11, at 979.

²⁸ *Smith v. Superior Court for the County of Los Angeles*, 151 Cal. App. 3d 491, 496 (1984).

²⁹ *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986).

³⁰ *Id.*

³¹ *Id.* at 458.

³² *Id.* at 459.

³³ *Id.*

Court,³⁴ unanimously held that a common law cause of action did exist for "intentional interference with prospective civil action by spoliation of evidence."³⁵ The court, however, did not discuss its reasoning for adopting the tort, and only stated that it did exist in Alaska, and thus plaintiff could maintain her cause of action.

As for the tort of negligent spoliation of evidence, many of these alternative remedies, such as criminal statutes, are not applicable, thus requiring the tort to be adopted in order to both deter undesirable negligent conduct and to compensate injured parties.

III. NEGLIGENT SPOILIATION OF EVIDENCE

The tort of negligent spoliation of evidence very much resembles that of intentional spoliation of evidence. However, an "intent" by the opposing party to destroy, misplace, or tamper with the evidence is not required.

A. *Situations In Which Negligent Spoliation of Evidence Has Arisen*

Negligent spoliation of evidence arises in two different contexts. First, when one party to a pending or potential action unintentionally destroys or loses evidence which, in turn, has a favorable effect on his position in the case. For example, in a medical malpractice case in Florida, *Bondu v. Gurvich*,³⁶ a defendant hospital lost information, including medical and surgical treatment notes and records, relating to the plaintiff's husband immediately before his death on the operating table.³⁷

The second context arises when an independent, totally disinterested third party destroys or loses evidence in a pending litigation. This can best be illustrated by considering the facts in *Velasco v. Commercial Building Maintenance Co.*³⁸ In *Velasco*, a janitor, while cleaning an attorney's desk, threw out the remnants of a defective bottle that was to be the key evidence in a potential products liability suit.³⁹ These are the two prime cases in which negligent spoliation of evidence has been explicitly recognized by the courts.⁴⁰

³⁴ 151 Cal. App. 3d 491 (1984).

³⁵ *Hazen*, 718 P.2d at 463.

³⁶ 473 So. 2d 1307 (Fla. App. 1984), *rev. denied*, 484 So. 2d 7 (Fla. 1986).

³⁷ *Id.* at 1309-10.

³⁸ 169 Cal. App. 3d 874 (1985).

³⁹ *Id.* at 876.

⁴⁰ *Bondu*, 473 So. 2d at 1312; *Velasco*, 169 Cal. App. 3d at 877.

B. Alternatives to Adopting a New Tort

An independent tort action is by no means the only available remedial device that exists to deal with the occurrence of negligent spoliation of evidence. Relying upon the doctrine of *omnia praesumuntur contra spoliatores*,⁴¹ some courts have adopted the use of the presumption or inference that is used against parties who intentionally destroy evidence and have applied it to parties in pending litigation who *negligently* destroy evidence.⁴² Recently, the Sixth Circuit has upheld the use of inferences against the spoliating party in *Welsh v. United States*.⁴³ In this case, the defendants, doctors and a Veterans Administration hospital, lost and/or destroyed crucial bone specimens and medical records, thus precluding the plaintiff from proving negligence or proximate cause in a medical malpractice suit against the physician and hospital.⁴⁴ However, due to the defendants' negligence, the district court inferred these two requirements of negligence and causation, and found for the plaintiff.⁴⁵ In addition, the Supreme Court of Florida has upheld the use of a rebuttable presumption against those who negligently render potential evidence unavailable.⁴⁶

Although the doctrine of *omnia praesumuntur contra spoliatores* may be a viable alternative to deal with negligent spoliation of evidence, it may only be invoked when it is a party to the pending or potential litigation that has destroyed the evidence. For example, in the case of the defective bottle discarded by the unknowing janitor, a presumption could not be used against the spoliator because he was not a party to the initial litigation. Further, the Florida Supreme Court's use of the presumption was also based on the availability of sanctions against the destroying party under Florida Rule of Civil Procedure 1.380(b)(2) to deter this type of conduct.⁴⁷ Thus, because sanctions

⁴¹ See *supra* notes 12–14 and accompanying text.

⁴² See generally Laurie S. Longinotti, Comment, *Evidence—Welsh v. United States: Negligent Spoliation of Evidence: The Creation of a Rebuttable Presumption*, 19 MEM. ST. U. L. REV. 229, 230–33 (1989).

⁴³ 844 F.2d 1239 (6th Cir. 1988).

⁴⁴ *Id.* at 1240–43. The action was brought under the Federal Tort Claims Act, under which liability is determined according to the substantive law of the state in which the alleged negligent action occurred. *Rayonier, Inc. v. United States*, 352 U.S. 315, 318–20 (1957). Under Kentucky law, a plaintiff in a medical malpractice action must prove negligence and proximate cause. *Jarboe v. Harting*, 397 S.W.2d 775, 777 (Ky. 1965).

⁴⁵ *Welsh*, 844 F.2d at 1243.

⁴⁶ *Public Health Trust v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987). The presumption is incorporated under either section 90.302(1) or 90.302(2) of Florida Statutes, by shifting either the burden of proof or the burden of persuasion. *Id.* at 600. See also C. Ehrhardt, FLORIDA EVIDENCE § 302.1 (2d ed. 1984).

⁴⁷ *Public Health Trust*, 507 So. 2d at 599.

may not be levied upon a disinterested, independent third party, an independent tort action for negligent spoliation of evidence is the only means to deter the negligent destruction of evidence and to compensate the aggrieved party for its destruction.

C. History of the Tort Action of Negligent Spoliation of Evidence

Although the history of the doctrine of *omnia praesumuntur contra spoliatores*, or simply "the presumption," can be traced back to the famous law school property case of *Armory v. Delamirie*,⁴⁸ and even further back to *R. v. Arundel*,⁴⁹ the tort action for negligent spoliation of evidence has no such classical history.

The cause of action was first recognized implicitly by the Supreme Court of California in *Williams v. State*.⁵⁰ In *Williams*, the plaintiff was injured when a portion of a brake drum broke off of a passing truck and struck her windshield. The plaintiff alleged that members of the California Highway Patrol who investigated the accident failed to identify other witnesses or attempt to find the truck that had dislodged part of its brake drum. Thus, the officers' negligence in the investigation severely prejudiced, and in essence precluded, the plaintiff's chance of recovery from either the truck driver or the manufacturer of the truck.⁵¹ The California Supreme Court held that because the officers *did not owe a duty* to protect plaintiff's prospects for recovery by civil litigation,⁵² there was no cause of action for the negligent destruction of plaintiff's chance of recovery from the truck driver and/or manufacturer.⁵³

One year later, the Florida Court of Appeals, in *Bondu v. Gurvich*,⁵⁴ explicitly recognized a cause of action for the loss or destruction of medical records by the defendant hospital.⁵⁵ The court stated:

New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the

⁴⁸ 1 Strange 506, 93 Eng. Rep. 664 (1722).

⁴⁹ Hob. 109, 80 Eng. Rep. 258 (1617).

⁵⁰ 664 P.2d 137 (Cal. 1983); *see also* Pirocchi v. Liberty Mut. Ins. Co., 365 F. Supp. 277 (E.D. Pa. 1973).

⁵¹ *Williams*, 664 P.2d at 138.

⁵² CAL. VEH. CODE § 2412 (West 1987); *Winklemen v. City of Sunnyvale*, 59 Cal. App. 3d 509, 511 (1976); *McCarthy v. Frost*, 33 Cal. App. 3d. 872, 876 (1973).

⁵³ *Williams*, 664 P.2d at 143.

⁵⁴ 473 So. 2d 1307 (Fla. App. 1984).

⁵⁵ *Id.* at 1312-13 ("Since Mrs. Bondu alleges that this duty was breached by the hospital when it failed to furnish Mr. Bondu's records to her, and that this breach caused her damage in that she lost 'a medical negligence lawsuit when [she] could not provide expert witnesses,' her complaint states a cause of action.").

court has struck out boldly to create a new cause of action, where none has been recognized before. . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.⁵⁶

However, the court did qualify this, requiring that before a cause of action exists for negligent spoliation of evidence, there must be: "(1) the existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others including the plaintiff; (2) a failure on the part of the defendant to perform that duty; and (3) an injury or damage to the plaintiff proximately caused by such failure."⁵⁷

In *Bondu*, contrary to *Williams*, a state statute explicitly required the defendant hospital to retain the plaintiff's medical records.⁵⁸ Therefore, the required "duty" on the part of the defendant did exist, with which the defendant failed to comply.⁵⁹ The most troubling aspect of the court's decision dealt with the issue of damages. Although the court explicitly required "an injury or damage to the plaintiff proximately caused by such failure,"⁶⁰ the court merely stated that she was damaged since she lost the potential to pursue a medical negligence lawsuit. As will be discussed in section III-E, the speculative nature of the damages has caused numerous jurisdictions to either refuse to recognize the spoliation causes of action or to limit the circumstances in which they can be brought.

In 1985, the California Court of Appeals for the Second District, basing its decision on the same criteria as the *Smith* court's recognition of intentional spoliation of evidence, formally recognized a cause of action for the negligent destruction of evidence needed for prospective civil litigation.⁶¹ Other states, such as Illinois and Minnesota, have not explicitly accepted the new tort, but have done so implicitly. For example, in Illinois, the State Court of Appeals seemed to infer that the tort had been previously recognized in dicta in another opinion, but due to the untimeliness of the complaint, the plaintiff's cause of action was premature.⁶²

⁵⁶ *Id.* at 1312 (quoting W. PAGE PROSSER, PROSSER AND KEETON ON TORTS § 1 (4th ed. 1971)).

⁵⁷ *Id.* at 1312; *see also* Stahl v. Metropolitan Dade County, 438 So. 2d 14, 17 (Fla. App. 1983).

⁵⁸ FLA. STAT. ANN. § 395.202 (West 1979).

⁵⁹ *Bondu*, 473 So. 2d at 1313.

⁶⁰ *Id.* at 1312.

⁶¹ Velasco v. Commercial Bldg. Maintenance Co., 169 Cal. App. 3d 874, 877 (1985).

⁶² Rodgers v. St. Mary's Hosp., 556 N.E.2d 913, 915 (Ill. App. 1990). "However, the *Fox* court held the plaintiff's spoliation of evidence action was premature In the

Similarly, the Supreme Court of Minnesota in *Federated Mut. Ins. v. Litchfield Precision Components, Inc.*,⁶³ also implicitly recognized the tort of negligent spoliation of evidence. The court, however, required that the plaintiff fully pursue his pre-existing cause of action to its full extent before filing the spoliation cause of action, so that damages due to the destruction of evidence could be ascertained with greater certainty. Simply put, the effects that the destruction of the evidence have on the underlying action cannot be fully determined until the results of the underlying action are first determined.⁶⁴

D. *The Most Recent Decisions*

Although a trend can be seen in recognizing the causes of action, some courts have refused to adopt the torts of intentional spoliation and negligent spoliation of evidence.⁶⁵ But upon examination of these opinions, it is difficult to ascertain whether each court felt that the tort should never be recognized, or whether based upon the applicable facts, it was not necessary and/or proper to recognize the particular tort at that time.

One of the most recent, more famous cases still pending, *Trump Taj Mahal v. Construzioni Aeronautiche Giovanni*,⁶⁶ involves a spoliation of evidence issue. On October 10, 1989, three high-level executives of Donald Trump's Atlantic City Casino operations were killed when their helicopter began to disintegrate in mid-air.⁶⁷ Shortly after the accident, the defendant-manufacturer of the helicopter agreed to allow plaintiffs' representatives to "inspect, examine, and photograph the failed components of the accident helicopter which were in Agusta defendants' custody, yet breached the agreement by sending the parts to Italy, where plaintiffs alleged they were partially

present case, we . . . need not decide whether a wide ranging common law spoliation of evidence tort should be recognized" *Id.* at 915-16.

⁶³ 456 N.W.2d 434 (Minn. 1990).

⁶⁴ *Id.* at 439.

⁶⁵ See *La Raia v. Superior Court*, 722 P.2d 286, 289 (Ariz. 1986) (court refused to adopt spoliation of evidence as a tort action; however, the plaintiff already had two causes of action for recovery for injuries she sustained because of defendant's conduct); *Koplin v. Rose Well Perforators, Inc.*, 734 P.2d 1177, 1183 (Kan. 1987) ("[A]bsent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties, the new tort of 'the intentional interference with a prospective civil action by spoliation of evidence' should not be recognized in Kansas."); *Miller v. Montgomery County*, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985) ("[H]ere the alleged spoliation was by a party to the cause and as against such party there is no separate cause of action because there is no basis or need for one . . .").

⁶⁶ 761 F. Supp. 1143 (D.N.J. 1991), *aff'd*, 958 F.2d 365 (3d Cir. 1992).

⁶⁷ Brief for Appellants at 9, *Trump Taj Mahal v. Construzioni Aeronautiche Giovanni*, No. 91-5295 (3d Cir. 1991).

destroyed.”⁶⁸ The District Court for the District of New Jersey dismissed plaintiffs’ cause of action on this count because the torts of intentional and/or negligent spoliation of evidence had never previously been recognized in New Jersey.⁶⁹

However, the New Jersey Court of Appeals has, at least implicitly, recently adopted the tort of spoliation of evidence.⁷⁰ In a decision handed down October 1, 1991, the appellate court allowed the plaintiff’s cause of action against the defendant who fraudulently concealed information concerning the plaintiff’s product liability action against the manufacturer of an industrial press.⁷¹ The Third Circuit was been apprised of the recent Appellate Court decision for their consideration of the *Trump* appeal.⁷² However, despite the *Viviano* decision, the Third Circuit affirmed the district court without opinion.⁷³ Because the Third Circuit affirmed the district court without issuing an opinion, it is difficult to know why it ignored the New Jersey Court of Appeals decision in *Viviano*.

E. The Speculativeness of Damages

The greatest potential issue in both intentional and negligent spoliation of evidence cases is the amount of damages the aggrieved party actually incurs due to the destruction or concealment of the evidence.⁷⁴ As was stated in the *Bondu* case, the injury to the party must be proximately caused by the defendant’s spoliation of the evidence.⁷⁵ But what damage does the aggrieved party actually suffer?

⁶⁸ *Id.* at 10.

⁶⁹ *Trump Taj Mahal*, 761 F. Supp. at 1162.

⁷⁰ *Viviano v. CBS, Inc.*, 597 A.2d 543, 549–50 (N.J. Super. Ct. App. Div. 1991), *cert. denied*, 606 A.2d 375 (N.J. 1992).

⁷¹ *Id.*

⁷² Letter from Catherine Slavin, Attorney for Plaintiff-Appellant Trump Taj Mahal to author (Dec. 9, 1991).

⁷³ *Trump Taj Majal v. Constructioni Aeronautich Giovanni*, 958 F.2d 365 (3d Cir. 1992).

⁷⁴ See generally Paul Gary Kerkorian, *Negligent Spoliation of Evidence: Skirting the “Suit Within a Suit” Requirement of Legal Malpractice Actions*, 41 HASTINGS L.J. 1077, 1100–03 (1990).

⁷⁵ *Bondu v. Gurvich*, 473 So. 2d 1307, 1312 (Fla. App. 1984).

1. *The General Rule of Permitting Flexibility in the Pleading and Proof of Damages*

In the case where the spoliating party is a party to the underlying action, the general rule is to allow flexibility in the pleading and proof of damages.⁷⁶ This is because the opposing party has made it more difficult for the aggrieved party to prove its case. In addition, the relaxation of the proof of certainty of damages deters careless handling of important, relevant evidence to a pending action by the opposing party. This obviously would not apply to a situation where the spoliator is an independent, disinterested third party. Because in this situation the spoliating party generally gains nothing from the destruction of the evidence, there is not as great a social imperative or need to deter this type of negligent behavior.

2. *The Two Extreme Positions*

Although the relaxation doctrine is a generally accepted principle,⁷⁷ courts that have faced the issue have adopted two extreme positions. The California courts by far are the most lenient in the damages requirement. As was stated by the *Smith* court:

[When] the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making amends for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result is only approximate.⁷⁸

This approach views the aggrieved party's damages as an injury to the expectancy of recovery, not to the recovery itself.⁷⁹

⁷⁶ *Lamborn v. Dittmer*, 873 F.2d 522, 533 (2d Cir. 1989) ("Flexibility in permitting proof of damages is particularly appropriate where, as here, it is the defendant's allegedly wrongful conduct that frustrates more precise calculations."); *see also Strobl v. New York Mercantile Exch.*, 582 F. Supp. 770, 779 (S.D.N.Y. 1984), *aff'd on reh'g*, 768 F.2d 22 (2d Cir. 1985), *cert. denied*, 474 U.S. 1006 (1985).

⁷⁷ *See supra* note 76.

⁷⁸ *Smith v. Superior Court*, 151 Cal. App. 3d 491, 500 (1984) (quoting *Story Parchment Co. v. Paterson P. Paper Co.*, 282 U.S. 555, 563 (1931)).

⁷⁹ *Kerkorian*, *supra* note 74, at 1078.

The Illinois and Minnesota cases represent the other extreme position. The two most cited cases in Illinois⁸⁰ have both held that damages from the spoliation need to be proven for the spoliation case to survive summary judgment. In *Fox v. Cohen*,⁸¹ the plaintiff filed a spoliation action against a hospital that had misplaced EKG tracings and reports that were necessary to prove a medical malpractice claim against the decedent plaintiff's physicians. The Illinois Court of Appeals dismissed the action since the malpractice case had not yet been fully adjudicated and thus plaintiff could not prove damages due to the misplacement of the EKG tracings.⁸² The court stated that the fact that the plaintiff may lose her medical malpractice action is "purely speculative and uncertain."⁸³ The court further stated that "[t]he injury must be actual; the threat of future harm not yet realized is not enough."⁸⁴ In addition, the court held that "[l]iability cannot be based upon mere surmise or conjecture as to the cause of the injury."⁸⁵

In addition, the Supreme Court of Minnesota has explicitly followed the Illinois rule requiring a resolution of the underlying claim before proceeding with a cause of action for spoliation of evidence.⁸⁶ The court in *Federated* held that the uncertainty of damages prior to the resolution is just too great in a spoliation case and thus the underlying case must be pursued to its full disposition before raising a claim for spoliation of evidence.⁸⁷ While reducing the problem of speculativeness of damages, this position raises another problem, namely that of prolonged and excessive litigation. In Illinois and Minnesota, it appears as though the underlying action must be fully adjudicated, including all avenues of appeal. Because of the excessive caseload dockets carried today, this could theoretically require the aggrieved party to wait for the initial trial, wait for the corresponding first level of appeals to the intermediary appellate court, and further wait for possible appeals to the state's supreme court. In total this could mean that the party must wait well over a decade before filing a spoliation action.

⁸⁰ *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312 (Ill. App. Ct. 1986); *Fox v. Cohen*, 406 N.E.2d 178 (Ill. App. Ct. 1980).

⁸¹ 406 N.E.2d 178 (Ill. App. Ct. 1980).

⁸² *Id.* at 183.

⁸³ *Id.*

⁸⁴ *Id.* (citing W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 30, 143 (4th ed. 1971)).

⁸⁵ *Id.* at 183 (citing *Driscoll v. C. Rasmussen Corp.*, 219 N.E.2d 483 (Ill. 1966)); see also *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1321 (Ill. App. Ct. 1986); *DMI, Inc. v. Country Mut. Ins. Co.*, 402 N.E.2d 805, 806-07 (Ill. App. Ct. 1980).

⁸⁶ *Federated Mut. Ins. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 438 (Minn. 1990).

⁸⁷ *Id.* at 439; see also *Reliance Ins. Co. v. Arneson*, 322 N.W.2d 604, 607 (Minn. 1982).

The problem of excessively speculative damages is nothing new to courts, which have generally dealt with the issue leniently from the plaintiff's perspective. Consider the recovery of damages for lost profits. Whether the action is in contract or tort, courts have historically required the plaintiff to merely present the "best evidence available" as to the amount of the damages.⁸⁸ The aggrieved party is required to do no more.⁸⁹ A different formulation of the standard of proof is the requirement that plaintiff show a "reasonable basis" for the calculation of lost profits damage.⁹⁰ The United States Supreme Court interpreted this to mean that "[c]ertainty as to the amount goes no further than to require a basis for a reasoned conclusion."⁹¹ Thus, negligent spoliation of evidence cases would not be the first situations before the courts that involve extremely speculative damages.

3. Punitive Damages

The only reference to the potential of punitive damages in spoliation cases appears in the recently released opinion of the New Jersey Court of Appeals in *Viviano v. CBS, Inc.*⁹² The case involved an independent, disinterested third party's failure to produce a memorandum that disclosed the reason for plaintiff's accident. The memo also specifically named the manufacturer of a defective electric timer that probably caused the plaintiff to crush her hand while using an industrial press.⁹³ "By suppressing the . . . memorandum and removing the timer, CBS led plaintiff and her counsel down a primrose path,"⁹⁴ which caused the plaintiff a delay of four or five years in the resolution of her product liability claim against the timer manufacturer.⁹⁵

⁸⁸ ROBERT L. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS § 5.3 (2d ed. 1981).

⁸⁹ See *Knightsbridge Mktg. Servs., Inc. v. Promociones Y Proyectos, S.A.*, 728 F.2d 572, 575-76 (1st Cir. 1984); *Lundgren v. Whitney's, Inc.*, 614 P.2d 1272, 1276 (Wash. 1980).

⁹⁰ DUNN, *supra* note 88, at § 5.4; see also *Polaris Indus. v. Plastics, Inc.*, 299 N.W.2d 414, 419 (Minn. 1980) ("a reasonable basis on which to determine plaintiff's loss"); *Lundgren*, 614 P.2d at 1276 ("Lost profits are recoverable to the extent the evidence permits their estimation with reasonable certainty.").

⁹¹ *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 561 (1941).

⁹² 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991), *cert. denied*, 606 A.2d 375 (N.J. 1992). Note that this case involved the "fraudulent concealment of evidence." However, the court stated that this cause of action is analogous to the recently recognized tort of spoliation of evidence. *Id.* at 549-50.

⁹³ *Id.* at 545-46.

⁹⁴ *Viviano v. CBS, Inc.*, 503 A.2d 296, 306 (N.J. 1986).

⁹⁵ *Viviano*, 597 A.2d at 551.

The court stated that there was a sufficient basis for the award of punitive damages because of the existence of "substantial evidence of intentional wrongdoing in the sense of an 'evil minded act' or *an act accompanied by wanton and willful disregard of the rights of another*."⁹⁶ The court then stated that it was an apt case for the award of punitive damages which are intended to punish a tortfeasor and to deter him and others from similar conduct.⁹⁷

This appears to be the only spoliation case awarding punitive damages. Ironically, the case involved a disinterested, independent third party that had failed to produce the evidence. One would logically expect punitive damages to be awarded in cases in which the spoliator was a party to the underlying action, because generally the goal of deterring his destruction of the evidence is an even greater social imperative compared to the deterrence of such action by third parties.⁹⁸ "Such damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example."⁹⁹

IV. THE NEED FOR THE ADOPTION OF THE TORT OF NEGLIGENT SPOILIATION OF EVIDENCE

Although it is a well accepted principle that the negligent spoliation of evidence is a type of conduct that should be deterred, many courts have refused to adopt the new tort, stating that appropriate safeguards currently exist to deter this type of conduct.¹⁰⁰ In *Miller v. Montgomery County*,¹⁰¹ a Maryland Court of Appeals refused to adopt the new tort because the destroying party was already a party to the underlying action, and thus the jury could be instructed to infer that the destroyed evidence would have been detrimental to the defendant's case had the defendant not destroyed it.¹⁰² The Supreme Court of Arizona similarly felt that the plaintiff had sufficient compensation against a defendant who suppressed evidence in the pending litigation.¹⁰³ However, these rationales for refusing to adopt the tort cannot be extended to the cases in which the independent, disinterested third party destroys the evidence. Because

⁹⁶ *Id.* at 551-52 (emphasis added) (citing *Nappe v. Anschlewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1230 (N.J. 1984)).

⁹⁷ *Viviano*, 597 A.2d at 551 (citing *Fischer v. Johns-Manville Corp.*, 472 A.2d 577, 584 (N.J. Super. Ct. App. Div. 1984), *aff'd*, 512 A.2d 466 (N.J. 1986)).

⁹⁸ For a review of the imposition of punitive damages, see generally DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 3.9 (1973).

⁹⁹ W. PAGE KEETON, *PROSSER AND KEETON ON TORTS* § 2 at 9 (5th ed. 1984).

¹⁰⁰ See *supra* notes 41-47 and accompanying text.

¹⁰¹ 494 A.2d 761 (Md. Ct. Spec. App. 1985).

¹⁰² *Id.*; see also *Lionberger*, *supra* note 23, at 218.

¹⁰³ *La Raia v. Superior Court*, 722 P.2d 286, 289 (Ariz. 1986).

the spoliator is not a party to the underlying action, the doctrine of *omnia praesumuntur contra spoliatores* cannot be invoked, nor are judicial sanctions available. In addition, the statutes that do deal with the destruction of evidence generally require a certain degree of *mens rea* (a "culpable mental state") to constitute a violation, and do not impose strict liability.¹⁰⁴ Thus, they do not apply to the case where the destruction is merely due to one's negligence, nor do they compensate the aggrieved party in any way.¹⁰⁵ This means that the only adequate alternative in many situations for the aggrieved party is an independent tort action for negligent spoliation of evidence or for negligent interference with prospective civil litigation.¹⁰⁶

A. *The Drawbacks and Social Costs of Recognizing the New Tort*

Although the need does exist for jurisdictions to adopt the tort of negligent spoliation of evidence, costs do exist. Obviously, the first "social cost" of any tort or new cause of action, spoliation included, is the potential of increased litigation. Although this may be good news for attorneys, the majority of the American public views it as a drain on fiscal resources.

Individuals have many interests for which they claim protection from the law, and which the law will recognize as worthy of protection. . . . The administration of the law becomes a process of weighing the interests for which the plaintiff demands protection against the defendant's claim to untrammelled freedom in the furtherance of defendant's desires, together with the importance of those desires themselves.¹⁰⁷

Both courts and commentators have written that adequate remedies exist to deter spoliation of evidence, and thus an increase in court dockets is unnecessary.¹⁰⁸ The other problem is that although the defendant in a negligent spoliation case did perform some type of socially undesirable negligent conduct, there is a certain unfairness in subjecting him to extremely speculative damages.¹⁰⁹ For example, the evidence that was destroyed by the spoliating party may in fact end up not being detrimental to the underlying action when

¹⁰⁴ See *supra* note 21 and accompanying text.

¹⁰⁵ Lionberger, *supra* note 23, at 219-20.

¹⁰⁶ The terms are generally interchangeable. The latter recognizes the *Smith* court's view of the damages in this situation being the loss of the prospects of recovery in a civil suit.

¹⁰⁷ W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 3, at 16 (5th ed. 1984).

¹⁰⁸ Solum & Marzen, *supra* note 20, at 1086-1137; see also *La Raia v. Superior Court*, 722 P.2d 286, 289 (Ariz. 1986); *Miller v. Montgomery County*, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985).

¹⁰⁹ E.g., *Fox v. Cohen*, 406 N.E.2d 178 (Ill. App. Ct. 1980).

that action is finally adjudicated. Thus, the requirements of Illinois and Minnesota that the underlying action be fully adjudicated helps relieve this potential injustice.¹¹⁰

In addition to being extremely speculative, damages for spoliation of evidence can be extremely disproportionate to the culpability of the negligent party. For instance, the janitor in *Velasco* could have been subject to excessive damages for merely throwing out a broken bottle, which turned out to be the prime, if not the only, evidence in the plaintiff's potential product liability claim.¹¹¹ A picture may be worth a thousand words, but a piece of evidence may be worth hundreds of thousands of dollars. No court has yet confronted the issue of disproportionate damages that negligent spoliation of evidence actions may produce. However, it is doubtful that any jurisdiction would be extremely concerned with the issue. Damages for tort actions often rely on "the luck of the draw." For example, consider the typical automobile accident, in which the culpable party is responsible for the damages caused to the injured party. The defendant could be liable for an extreme amount of damages for injuring or killing a neurosurgeon in her mid-thirties, while damages might be minimal for the same accident if the injured party was a retired man in his early eighties. Further, although potential drawbacks exist with the adoption of every new cause of action, there are also potential benefits.

B. *The Benefits of Recognizing the New Tort*

There are at least two societal benefits in recognizing the cause of action for negligent spoliation of evidence. First, the tort serves to deter undesirable conduct on the part of the defendant. This is evident in the situation where the spoliator is a party to the already pending litigation. The tort helps to assure that the parties will handle evidence carefully and with the utmost diligence, as opposed to hoping that undesirable evidence may disappear in favor of their position in the litigation. The preservation of evidence can only serve to further the fair adjudication of claims. Thus, any procedure that encourages the preservation of evidence furthers the quality of American jurisprudence.

Second, as stated in Section IV, the currently available remedies may not adequately compensate the aggrieved party.¹¹² Thus, the current system may not be able to put the plaintiff in the position that he was in before the destruction of his evidence. The cause of action for negligent spoliation of evidence has the potential, in many situations, of solving this discrepancy. Although any new tort may be viewed as a drain on judicial resources, a

¹¹⁰ See *supra* notes 102-07 and accompanying text.

¹¹¹ *Velasco v. Commercial Bldg. Maintenance Co.*, 169 Cal. App. 3d 874, 876 (1985).

¹¹² See *supra* notes 100-106 and accompanying text.

thorough inquiry into its potential benefits must be completed before any judgment on whether the action should be adopted is passed upon.

V. IMPLEMENTING THE INDEPENDENT TORT ACTION

The tort of negligent spoliation of evidence should be adopted by those jurisdictions that have not yet faced the issue. "[B]ecause [an] independent action for the spoliation of evidence is a better means for achieving the desired goals of compensating injured parties and deterring future destruction of evidence, [states] should adopt this new tort."¹¹³

Since the safeguards pertaining to intentional spoliation of evidence are not transferable to the cases of negligent spoliation of evidence,¹¹⁴ there exist few, if any, safeguards to deter the negligent handling of evidence. In addition, the compensation to the aggrieved party is minimal absent an independent tort action.

Although the tort should be adopted, the question arises as to when the aggrieved party should be allowed to bring the action. Must the party wait until the underlying action is fully adjudicated and all avenues of appeal exhausted?¹¹⁵ Or rather, should the plaintiff merely be required to plead damages with minimal specificity?¹¹⁶

A. *Situations in Which the Spoliator is Already a Party to a Pending Action*

If the spoliator is already a party to the underlying litigation, the spoliation action should be allowed to be immediately filed. This would potentially reduce a repetition of efforts on the part of the parties and the courts. Allowing the spoliation suit to go hand-in-hand with the underlying action would prevent a duplication of efforts in producing the same general evidence and witnesses that were brought in the original action. In addition, the problem of the spoliation suit being tried a considerable number of years after the alleged conduct occurs is solved.

¹¹³ Lionberger, *supra* note 23, at 220.

¹¹⁴ As stated, generally penal statutes do not apply to negligence situations and sanctions are not available against an individual who is not a party to the underlying action.

¹¹⁵ Fox v. Cohen, 406 N.E.2d 178, 183 (Ill. App. Ct. 1980) (citing Driscoll v. Rasmussen Corp., 219 N.E.2d 483 (Ill. 1966)); *see also* Petrik v. Monarch Printing Corp., 501 N.E.2d 1312, 1321 (Ill. App. Ct. 1986); DMI, Inc. v. Country Mut. Ins. Co., 402 N.E.2d 805, 806-07 (Ill. App. Ct. 1980); Federated Mut. Ins. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 438 (Minn. 1990).

¹¹⁶ Smith v. Superior Court, 151 Cal. App. 3d 491, 500 (1984) (citing Story Parchment Co. v. Paterson P. Paper Co., 282 U.S. 555, 563 (1931)).

Theoretically, if the suit were required to be stayed until the final disposition of the underlying action, it might actually encourage rather than deter a party from negligently or intentionally destroying or losing evidence. In some situations delays may benefit a party, and the excess of the benefits the party receives over the potential costs may persuade that party to not fully protect evidence. Although damage computation is extremely speculative, determining the amount of damages is no more speculative than in cases of lost profits or damages from loss of a prospective business opportunity. "Where injury to some degree is found, we do not preclude recovery for lack of precise proof. We do the best we can with what we have. We do not, 'in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances precision is unattainable.'"¹¹⁷ In addition, it must be remembered that it is because of the spoliator's own actions which renders the damages speculative.¹¹⁸ Thus, it is not that unjust to relax the damage certainty standard in these situations.

B. Situations in Which the Spoliator is an Independent, Disinterested Third Party

If the spoliator is an independent, disinterested third party, the same question arises as to when the tort action should be allowed to be filed. The major difference is that the spoliator generally has nothing to gain by the destruction of the evidence. Thus, it may not be as great a social imperative to allow the spoliation suit to be brought immediately, but rather to require the aggrieved party to wait until the litigants in the underlying action resolve their dispute.

The problem again is that the aggrieved party may be damaged today due to the spoliator's negligence; however, he may be forced to wait a considerable number of years before he can bring any type of action. In the case of a product liability action, for example, if the spoliator loses or destroys the defective product it may completely destroy any potential for recovery from the manufacturer that the plaintiff would have had. However, the plaintiff must now wait until the product liability suit is completely adjudicated before he can seek any damages for the spoliation, which would be his only recovery.

Again, if the spoliation suit were allowed to be filed immediately, there is a potential that the spoliator could be joined in the pending litigation, possibly as either a necessary party under Rule 19 of the Federal Rules of Civil Procedure¹¹⁹ or a similar state rule, or possibly as a permissive party under

¹¹⁷ *Fera v. Village Plaza, Inc.*, 242 N.W.2d 372, 376 (Mich. 1976) (quoting *Godwin v. Ace Iron & Metal Co.*, 137 N.W.2d 151, 156 (Mich. 1965)).

¹¹⁸ See *supra* note 76 and accompanying text.

¹¹⁹ FED. R. CIV. P. 19(a).

Rule 20.¹²⁰ This would reduce any duplication of efforts in retrying the underlying action to determine the extent of the damages proximately caused by the negligent spoliation.¹²¹

If courts are troubled by subjecting independent third parties to excessive, and perhaps speculative, damages, they could conceivably adopt a requirement similar to Illinois and Minnesota, which require the damaged party to wait until the underlying claim is fully adjudicated so that damages can be ascertained with greater certainty.¹²² Correspondingly, in the case of the spoliation being caused by the negligence of an already existing party to the litigation, the court could allow the spoliation action to be brought immediately without the delay, thus ensuring that the parties to the existing litigation are adequately deterred from "accidentally misplacing or discarding" evidence.

Which "timing" alternative or combination of alternatives a jurisdiction eventually chooses to adopt is uncertain, but it can be seen from the trend over the past eight years that the tort of negligent spoliation of evidence will be recognized by most jurisdictions that are given the opportunity to adopt it.¹²³

VI. CONCLUSION

Viewing the social costs of adopting a new cause of action, primarily increased litigation and the potential of subjecting a defendant to excessively speculative damages, some may argue that recognizing the tort of negligent spoliation of evidence would not be in the best interest of American jurisprudence. However, the destruction of evidence is conduct that must be deterred, and alternatively, compensated for when it does occur. Since the present systems in most jurisdictions do not adequately deter nor compensate aggrieved parties, the adoption of an independent cause of action for the negligent spoliation of evidence may be the only acceptable alternative.

John K. Stipancich

¹²⁰ FED. R. CIV. P. 20(a).

¹²¹ Of course, any of these alternatives could easily be adopted to apply to the cases of intentional spoliation of evidence, but since numerous safeguards and remedial measures currently exist in those cases, there is not such a great imperative to recognize the tort action.

¹²² See *supra* notes 80-87 and accompanying text.

¹²³ Lionberger, *supra* note 23, at 230-32; see also Comment, *supra* note 26, at 198; Comment, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665, 1680 (1979).